

**Balak Ram Vaish Vs. Badri Prasad Avasthi**

**Balak Ram Vaish Vs. Badri Prasad Avasthi**

**SooperKanoon Citation :** [sooperkanoon.com/449094](http://sooperkanoon.com/449094)

**Court :** Allahabad

**Decided On :** Oct-27-1967

**Reported in :** AIR1969All88

**Judge :** G.D. Sahgal, J.

**Acts :** [General Clauses Act, 1897](#) - Sections 24; Uttar Pradesh Home Guards Adhinyam, 1963 - Sections 15; [Constitution of India](#) - Article 191; State Legislature Members Prevention of Disqualifications Act - Sections 3; Uttar Pradesh State Legislature Members Prevention of Disqualifications Act, 1951; State Legislature Members (Prevention of Disqualifications) (Second) Act - Sections 3(2); Uttar Pradesh State Legislature Members (Prevention of Disqualifications) (Second) Act; [1952](#); Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1951 - Sections 127B; Uttar Pradesh Zamindari Abolition and Land Reforms Rules, [1952](#) - Rule 114; [Representation of the People Act, 1951](#) - Sections 77, 77(1), 77(3) and 123(6)

**Appeal No. :** Election Petn. No. 1 of 1967

**Appellant :** Balak Ram Vaish

**Respondent :** Badri Prasad Avasthi

**Advocate for Def. :** S.D. Misra, Adv.

**Advocate for Pet/Ap. :** Bishen Singh, Adv.

**Judgement :**

Sahgal, J.

1. At the last general election held on the 15th of February, 1967 there were eleven candidates for election to the U. P. Legislative Assembly from the Lucknow Cantonment Constituency No. 104. A declaration was made on the '23rd of February, 1967 of the result of the election and respondent No. 1 was declared duly elected. This petition has been filed by one of the candidates Balak Ram Vaish challenging that election with a prayer that the election of Badri Prasad Awasthi (respondent No. 1) be declared void and that the petitioner be declared elected as a member of the U. P. Legislative Assembly.

2. Respondent No. 1 was an adjutant in the Home Guards Organisation and one of the grounds taken in the petition is that being an adjutant under the U. P. Home Guards Adhinyam, 1963, (hereinafter to be described as the Adhinyam), he held an office of profit within the meaning of that term under Article 191 of the Constitution and as such was disqualified for being chosen as, and for being a member of the U. P. Legislative Assembly

3. It was also pleaded that respondent No. 1 was a panel lawyer having been appointed by the State Government to conduct suits and other proceedings by and against the Gaon Sabhas in the Tahsil of Mohanlalganj, district Lucknow with effect from the 15th of September. 1965, the appointment being made

by the State Government of Uttar Pradesh under Section 127-B of the U. P. Zamindari Abolition and Land Reforms Act (Act I of 1951) (hereinafter to be described as the Abolition Act) and this post also was an office of profit within the meaning of that term under Article 191 of the Constitution thus disqualifying him for being chosen as, and for being, a member of the Legislative Assembly.

4. The petitioner also pleaded that respondent No. 1 had not maintained accounts in accordance with the provisions of Section 77 of the [Representation of the People Act, 1951](#) (hereinafter to be described as the Representation Act) and he had failed to show in his return of expenses a sum of Rs. 50 advanced by him to one Chamman. He had also failed to show the expenses incurred by him on the polling day. This amounted, according to the petitioner, to a corrupt practice under Section 123(6) of the Representation Act.

5. Respondent No. 1 denied that he was an adjutant under the Adhinyam but claimed that he was one under a Government Scheme promulgated prior to the Adhinyam. His contention was that whether he be an adjutant in the Home Guards under the Adhinyam or under the Scheme, he did not hold an office of profit and, even if he held an office of profit he was exempt from the disqualification mentioned in Article 191 of the Constitution under the provisions of U. P. Act XIX of 1951 and U. P. Act XIII of [1952](#).

6. It was admitted that respondent No. 1 was a panel lawyer of the Gaon Sabhas in the Tahsil of Mohanlalganj but it was denied that it amounted to his holding of an office of profit and in this case also it was pleaded, though unfortunately no issue seems to have been struck, specifically on this aspect of the case, that he was exempt from disqualification, if any under the two Acts, referred to above. The fact that no issue has been struck on this aspect of the case is not material as it is a pure question of law and I have been addressed on this aspect of the case also.

7. As to the expenses incurred on the polling day, it was pleaded that no expenses were incurred by respondent No. 1 on the polling day and that the amount of Rs. 50 advanced by him to Chamman has been entered in the return of expenses. In any case, it was asserted that the failure to show the expenses incurred on the polling day or the payment of a sum of Rs. 50 advanced to Chamman in the return of expenses did not amount to a corrupt practice under Section 123(6) of the Representation of the People Act.

8. There were other pleas also taken in the case, but we are not concerned with those pleas and they are not to be determined at this stage, only the pleas which raised pure questions of law having been heard at this stage under Order XIV Rule 2 of the Code of Civil Procedure at the request of respondent No. 1.

9. Five issues were struck in the case, but the following only are relevant for purposes of enquiry at this stage :

1. Whether respondent No. 1, the returned candidate, is an adjutant under the U. P. Home Guards Adhinyam, 1963? If so, does he hold an office of profit within the meaning of that term under Article 191 of the Constitution and as such was he not eligible for and was disqualified to be elected to the U. P. Legislative Assembly?

Even if respondent No. 1 was not an adjutant under the U. P. Home Guards Adhinyam, 1963, but was one under a Government Scheme promulgated prior to that Adhinyam, can he still be said to hold an office of profit?

Even if he be an adjutant under the U. P. Home Guards Adhinyam, 1963, can it at all be said that he holds an office of profit?

Even if it be held that he holds an office of profit is he exempt under U. P. Act XIX of 1951 and U. P. Act XIII of [1952](#)?

2. Whether respondent No. 1 holds an office of profit within the meaning of that term under Article 191 of the Constitution on account of his being a panel lawyer of the Gaon Sabhas in the Tahsil of Mohanlalganj?

5. Has respondent No. 1 failed to show the expenses incurred by him on the polling day in his return and were such expenses incurred at all on that date?

Has he failed to show in his return of expenses a sum of Rs. 50 advanced by him to one Chamman?

If respondent No. 1 has failed to show the expenses incurred by him on the polling day and/or to show in his return the expenses to the extent of Rs. 50 advanced by him to Chamman, will it amount to a corrupt practice under Section 123(6) of the [Representation of the People Act, 1951](#)?

10. By an order dated the 16th of October, 1967 I directed that the case shall be put up for the decision of the 2nd, 3rd and 4th parts of issue No. 1, issue No. 2 and 3rd part of issue No. 5 at this stage. It may be pointed out that even though the first part of issue No. 1 was not ordered to be put up at this stage for arguments, it has been covered by the arguments advanced and as to Issue No. 2, an important aspect of the matter as to whether even if it be held that respondent No. 1 holds an office of profit within the meaning of that term under Article 191 of the Constitution, is he exempt under the provisions of U. P. Act XIX of 1951 and U. P. Act XIII of [1952](#), also has been covered and has already been argued out It being a pure question of law, which has been argued out at length, no prejudice has been caused to any party on account of this aspect of the matter being not specifically struck in the form of an issue in the case.

#### FINDINGS.

11. Issue No. 1 :- The Uttar Pradesh Home Guards Adhiniyam, 1963 (U. P. Act XXIX of 1963) provides for the constitution of a force known as the Uttar Pradesh Home Guards for utilising its services for duties in times of emergency and serving as an auxiliary to the police for the maintenance of law and order. A 'home guard' under the Act means a person who is enrolled as such, and includes an officer appointed under this Act. The functions of the home guards under the Act are provided in Section 4 of the Adhiniyam and their functions are covered by the purposes for which the Adhiniyam has been framed. The Home Guards are to serve as an auxiliary to the police, and when required, help in maintaining public order and internal security. They will help the community in air raids, fires, floods, epidemics and other emergencies. They will function as an emergency force for such special tasks as may be prescribed and they will provide functional units for essential services and will perform such other duties relating to any measure of public welfare as may be prescribed. Appointment of certain officers including a Commandant General of Home Guards is also contemplated under Section 5 of the Adhiniyam. Other officers apart from the Commandant General may also be provided on such terms and conditions as may be prescribed. The prescribing of the conditions, according to the definition of the word 'prescribe', is left to be made under the rules framed under Section 15 of the Adhiniyam. The superintendence of the Home Guards is to vest in and to be exercised by the State Government. Sub-section (3) of Section 6 provides that subject to the overall control and direction of the District Magistrate in any area within the district, the administrative control and direction of the Home Guards in that area shall vest in such officers as may be prescribed. Section 7 provides for the enrolment and it describes as to what an application for enrolment shall contain. A certificate is to be issued to him for appointment in the form set out in the Second Schedule under the seal and signature of such officer as may be prescribed as a result of which he shall be vested with the powers and privileges contemplated under the Act and shall be subject to the duties of a Home Guard. Officers and other members of the Home Guards are expected to wear such uniforms as may be prescribed. The District Magistrate may by order call out any Home Guard attached to a unit posted in the district for duty in any area within the district and the Commandant General or such officer of the Home Guards, as may be authorised by him in this behalf, may call out any Home Guard for duty in any part of the State or outside the State. Section 10 of the Adhiniyam provides that a Home Guard acting in the discharge of his functions under the Act shall be deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code. There is a liability attached to a Home Guard inasmuch as he shall be bound to serve in any unit of the Home Guards to which for the time being he may be attached subject to the rules that may be made in this behalf. The Home Guards shall be liable to serve when called for in a prescribed manner for duty in any part of the State. They may also be

required to render service outside the State, but they will not be required to do so unless they have given their consent in the prescribed manner for such service. The Commandant General or any officer prescribed in this behalf shall have the authority to discharge or suspend any member of the Home Guards in accordance with the rules made in this behalf. A Home Guard may also resign from the force after giving one month's notice delivered to such officer as may be prescribed. There are certain penalties also provided under the Adhiniyam for a Home Guard who fails to report himself when called out for duty under Section 8 of the Adhiniyam, or without sufficient excuse neglects or refuses to obey any lawful order or direction of his superior officer or other competent authority or fails to discharge his function as a member of Home Guards while on duty, or deserts his post, or is guilty of cowardice or offers any unwarranted personal violence to any person in his custody.

12. The first question to be determined is as to whether respondent No. 1 was a Home Guard employed under the Adhiniyam, But before deciding this point we have to look into the provisions of a certain Scheme also which was in existence for the creation of Home Guards even, before the Adhiniyam under an executive order of the Government.

13. Certified copies of a number of orders of the Government have been filed in the case to indicate as to what the Scheme of the Home Guards was and what were their duties and functions and the remunerations, if any, that were payable to them. The earliest letter in that connection is dated the 28th of February, 1963 (Exhibit A-4). It is a letter addressed by the Director of Civil Defence and Additional Secretary to the Government of Uttar Pradesh, Confidential (CD) Department to all the District Magistrates of Uttar Pradesh, which states that a scheme for Home Guards, which was shortly to be introduced, envisages the appointment in each Battalion of a number of superior officers who will be paid some remuneration, in the shape of an honorarium, to compensate them for their travelling and other expenses, and among the scales prescribed is to be found an honorarium of Rs. 50 per mensem for an adjutant. It then provides as to how the selection, for these posts will be made by the State, i. e., it shall be made by a Board specially constituted for the purpose. The letter also describes the number of Battalions sanctioned for the various districts. The qualifications of the various officers, also have been mentioned, the posts of the various officers being confined to Ex-Army or Ex-Police Officers or to members of University or Degree College staff with a background of military training and prepared to work on a part-time basis. The letter dated March 22, 1963 (Exhibit A-3) described the outlines of the Scheme for Home Guards on the basis of a proposal of the Government of India. The purposes of the force have been described to be more or less in the same manner in which they have been described in the Adhiniyam and the details need not be repeated. The liability for service also is similar. The various officers in the Organisation also have been described and one of the officers described is an adjutant attached to each Battalion. Physical standards, character and preference in enrolment also have been mentioned in the Scheme. The limitation as to service also has been described, the minimum period being three years with one month's notice on either side. The Commandant General may allow a member to withdraw otherwise also on compassionate grounds. The emoluments of the officers have also been described. For an adjutant Rs. 50 per mensem has been described as Instructor's allowance. Various other allowances have been described, but they seem to be applicable to the Home Guards as such and not to the officers. Training allowances at the rate of Rs. 2 per head per diem inclusive of expenditure on contingencies has been allowed when members of Home Guards are called up for collective training in camps at various levels. A parade allowance has been described as being 50 P. per head for each parade attended. The duty allowance also has been described under the rules when members are called up for duty outside their localities but within the State including costs of transport etc. which will not exceed Rs. 2 per diem per head. For duty outside the State it is prescribed that members will be paid a suitable duty allowance depending on the nature of the task assigned and the area in which it is to be performed. An idea is given in this letter about the training also that the Home Guards have to undergo. The types of arms to be provided to the Home Guards also are described. By a letter dated the 6th of December, 1963 (Exhibit A-6) sanction has been conveyed of the Government to the grant of an outfit allowance at the rate of Rs. 100 only initially to various officers. In another letter dated the 24th of February, 1964 (Exhibit A-7) it has been pointed out that the

provisions of Civil Service Regulations will not apply to the case of pensioners for the purposes of adjustment of pay and pension of re-employed pensioners if they happen to be appointed as Home Guards and it is stated that the pensioners will get such honoraria and allowances as may be prescribed for various ranks in the Home Guards Organisation. On the 9th of March, 1964, there was issued another letter (Exhibit A-8) which, among other things, says that the Instructor's allowance sanctioned in the earlier letter dated the 23rd of May, 1963 (Exhibit A-5) which describes the allowance for an Adjutant at Rs. 50 per mensem, may be treated as an honorarium and that G. O. has been modified to that extent. In that G. O. the allowance was described as Instructor's allowance.

14. We find on record in connection with the appointment of respondent No. 1 as Adjutant, a copy of his application (Exhibit 6) addressed by him to the Deputy Controller, Civil Defence, Lucknow, the application dated the 21st of June, 1963 having been made prior to the coming into force of the Adhinyam which was assented to by the Governor on the 30th of December, 1963 and which was published in the U. P. Gazette (Extraordinary) dated the 31st of December 1963. There was a recommendation on this application of the District Magistrate (Exhibit 8). The appointment order passed by the Commandant General (Exhibit 4) is dated the 11th of November, 1963. All these relate to the period prior to the coming into force of the Adhinyam. The appointment order provides that the appointee namely, respondent No. 1, would be entitled to Instructor's allowance at the rate of Rs. 50/- per mensem. The printed copy of this order is Exhibit 5. There does not appear to be any other application on behalf of respondent No. 1 on record or any other order as to his appointment. It thus appears that no application was made by respondent No. 1 after the coming into force of the Adhinyam nor any appointment made. The Adhinyam does not provide that the appointment made prior to its coming into force would terminate or it would be treated as having been made under the Adhinyam. In fact no rules have yet been framed by the Government under Section 15 of the Adhinyam.

15. Section 24 of the U. P. General Clauses Act provides that where any enactment is repealed and re-enacted by an Uttar Pradesh Act with or without modification, then, unless it is otherwise expressly provided, any appointment, notification, order, scheme, rule, form or by-law, made or issued under the repealed enactment shall, so far as it is not inconsistent with the provisions re-enacted, continue in force, and be deemed to have been made or issued under the provisions so re-enacted, unless, and until it is superseded by any appointment, notification, order, scheme, rule, form or by-law made or issued under the provisions so re-enacted.

16. This provision of law will not apply to the case because the Scheme that was enforced prior to the coming into force of the Adhinyam was under an executive order and not under an enactment which may have been repealed or re-enacted. It cannot, therefore, be said under this provision that the scheme under which the appointment of respondent No. 1 was made will be deemed to have been made under the rule-making power under Section 15 of the Adhinyam or the appointment, of respondent No. 1 should be deemed to have been made under the provisions of the Adhinyam. The rules under the Scheme made by an executive order have not the force of law as they are not statutory rules but are rules made by an executive authority. The principle embodied in Section 24 cannot be made applicable to such a case for what was done under a prior law only has to be deemed to have been done under a law which repeals or re-enacts it. The scheme having been made under an executive order cannot be said to have been made under any law or a law which may have been repealed or re-enacted by the Adhinyam. Respondent No. 1, therefore, cannot be said to have been appointed as an Adjutant under the Adhinyam. He is, however, an Adjutant under the Home Guards Organisation in accordance with the Scheme, referred to above. That scheme does not seem to have been put in abeyance on account of the Adhinyam and is still continuing, for respondent No. 1 continued to hold the office under the scheme even after the coming into force of the Adhinyam which office he has resigned, his resignation being accepted as from the 31st of March, 1967, as appears from an entry in the Commanders' Namawali Pustika, Second Battalion, Home Guards, Lucknow (Exhibit 9 at P. 7).

17. It must, therefore, be held that respondent No. 1 is not an Adjutant under the Home Guards Adhinyam, 1963. The question, therefore, whether he holds an office of profit by virtue of his being an Adjutant under

that Adhinyam does not arise.

18. The question, however, still remains to be determined as to whether he held an office of profit on the relevant date, it being not disputed that he was an Adjutant under the Home Guards Organisation under the Scheme both on the date of nomination and on the date of election.

19. Article 191 of the Constitution in so far as it is relevant provides that a person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly of a State if he holds any office of profit under the Government of India or the Government of any State specified in the First Schedule, other than an office declared by the Legislature of the State by law not to disqualify its holder.

20. The question to be determined is as to whether by virtue of his being an Adjutant under the Home Guards Organisation under a Scheme promulgated through an executive order, referred to above, respondent No. 1 held an office of profit under the Government of Uttar Pradesh, it being left to be determined later as to whether if he did hold an office of profit, has that office been declared by the Legislature of the Uttar Pradesh by law as not disqualifying him from being chosen as, and for being, a member of the Legislative Assembly. It is not disputed on behalf of respondent No. 1 that he holds an office. What is to be seen is as to whether he holds an office under the Government of Uttar Pradesh and whether it is an office of profit.

21. A number of authorities were cited at the Bar to show as to what is an office of profit and the circumstances under which an office can be said as being held under a Government. The cases which have been cited in this connection have either been decided by some Election Tribunals or by some High Court or by the Supreme Court. The Election Tribunals, as they stood constituted prior to the recent amendment of the Representation of the People Act, were subordinate authorities and were under the superintendence of the various High Courts under Article 227 of the Constitution. The orders by them were amenable to the jurisdiction of the various High Courts under Article 226 of the Constitution. The opinions expressed in the decisions of such Tribunals, though they may be of some persuasive value, will not be of that force which may be attached to a judgment of a High Court much less will they be of binding authority as would be the opinions of the Supreme Court. I, therefore, do not propose in the first instance to refer to the judgments of those Election Tribunals. I shall confine myself only to the law laid down by the High Courts as also by the Supreme Court. It may be necessary to refer to the decisions of the Election Tribunals also in case the point is found as having not been covered by the decisions of the High Courts or the Supreme Court.

22. Let me now take up such cases one by one.

23. The earliest case cited before me is that of *Ravanna Subanna v. G. S. Kag-geerappa*, AIR 1954 SC 653. It is pointed out in that case that the meaning of the expression seems to be that an office must be held under Government to which any pay, salary, emoluments or allowance is attached. The word 'Profit' connotes the idea of pecuniary gain. If there is really a gain, its quantum or amount would not be material, but the amount of money receivable by a person in connection with the office he holds may be material in deciding whether the office really carries any profit. The office in that case was that of the Chairman of Gubbi Taluk Development Committee. The Chairman was entitled to a fee of Rs. 6 for each sitting he attended. It was pointed out that the fee of Rs. 6 which the non-official Chairman was entitled to draw for each sitting of the committee, he attended, was not meant to be a payment by way of remuneration or profit, but it was given to him as a consolidated fee for the out-of-pocket expenses which he had to incur for attending the meetings of the committee and the Supreme Court thought that it was not the intention of the Government which created these Taluk Development Committees which were to be manned exclusively by non-officials, that the office of the Chairman or of the members should carry any profit or remuneration. What has, therefore, been laid down in this case is that an office in order to be an office of profit must, besides being held under Government, also carry pay, salary, emoluments or allowance attached to it. The term 'profit' connotes the idea of pecuniary gain and if there is really a gain, its quantum or amount would not be material. In the circumstances of that case a fee of Rs. 6 for each sitting of a certain committee was held only to be a fee for

out-of-pocket expenses and not profit.

24. The next case is that of *Dr. Deo-rao Laxman Anande v. Keshav Laxman Borkar*. AIR 1958 Bom 314 decided by the Bombay High Court. The expression 'office of profit' under the Government was analysed in that case as connoting of three things, namely. (1) that the person held an office, (2) that it was an office of profit and (3) that it was an office under the Government of India or the State Government. An office of profit, according to the view expressed in that case, means an office capable of yielding a profit or from which man might reasonably be expected to make a profit and, as has been laid down in *Ravanna's case*, AIR 1954 SC 653 (supra), the amount of such profit was immaterial.

25. The principal tests for deciding whether an office is under the Government, as pointed out in that case, are (1) what authority has the power to make an appointment to the office concerned, (2) what authority can take disciplinary action and remove or dismiss the holder of the office and (3) by whom and from what source is his remuneration paid. The learned Judges, however, proceeded to remark that of these the first two are more important than the third one.

26. The question was whether an Insurance Medical Practitioner functioning under the Employees' State Insurance Act, 1948, was a holder of an office and it was pointed out that the fact that he was allowed private practice would not alter the character of his appointment. Various sections of the Act were taken into consideration and it was held that the Insurance Medical Practitioner held a post or an office under the Government of Bombay.

27. Next we come to another case of the Supreme Court, namely, *Abdul Shakur v. Rikhab Chand*, AIR 1958 SC 52. There it was pointed out that the power of the Government to appoint a person to an office of profit or to continue him in that office or revoke his appointment at their discretion and payment from out of Government revenues are important factors in determining whether that person is holding an office of profit under the Government though payment from a source other than Government revenue is not always a decisive factor. In that case the person whose election was challenged was appointed by the Committee of the Durgah Endowment constituted under the Durgah Khwaja Sahib Act (Act XXXVI of. 1955). No doubt, although the Committee or the members of the Committee were removable by the Government of : India, the appointment of the Mohatmim (manager) of Madarsa Durgah Khwaja Sahib Akbari, who was appointed by that Committee, could not be said to be an appointment by the Government of India nor was he removable by the Government of India nor was the pay-ment made to him out of the revenue of the Government of India. In such circumstances, the mohatmim was held not to hold an office of profit under the Government. The test laid down, however, was the same as in the earlier two cases, namely, the power of the Government to appoint a person to an office of profit or, to revoke his appointment at their discretion and payment from out of the Government revenues, though the source of payment was held not to be always a decisive factor.

28. The matter came up before a Bench of the Rajasthan High Court In *Hoti Lal v. Raj Bahadur*, AIR 1959 Raj 227. In that case the question was whether the office of an Oaths Commissioner in Rajasthan is an office of profit under the Government of Rajasthan. It was pointed out therein that the fact that there is no fixed pay for the office is immaterial. So long as profit arises by fees or by commission to the holder of an office, the office will be an office of profit. The appointment in that case was to be made by the Judicial Department of the Government and it was pointed out that the words 'Government of India or the Government of any State' must be interpreted in their widest import and would thus include Judicial Office or office under the Judicial Department as the office under the Government of India or the Government of any State. It was also remarked that even an office held under the Legislature, as for example, the Secretary to a legislature or clerks working in the office of a legislature would also be holding office of profit under the Government of India or the Government of a State. The word 'Government' used in Article 102 must be read widely to include all the three functions of Government, namely, executive, legislative, judicial and an office of profit held under any of the three branches of Government would be an office under the Government of India or the Government of a State. That judgment was delivered for the Bench by Wanchoo, C. J. who is now the Chief

29. We next come to the case of Cheddu Singh v. Monohar Singh, AIR 1964 All 179 decided by a Bench of this Court. There it was held that a branch post-master is an officer in the employment of the Central Government- He is not a Government contractor, nor is he a civil servant nor can it be said that he is holding a civil post within the meaning of Article 311 of the Constitution, He could also not be said to be a Government Servant, but he did hold an office of profit under the Central Government. The duties assigned to him may be fewer than the duties that are assigned to a post-master or a sub-post-master because it is a branch post-office, but whatever duties are assigned to him are exactly the same as are assigned to any post-master or sub-post-master and are to be performed by him in the same way as by a post-master or sub-post-master. The quantum of emoluments that he receives is immaterial; it is enough that he receives emoluments by way of profit. What is laid down in this case is that in order that a person may be held to be holding an office of profit under the Central Government he must be shown in the first place to hold an office. Then it should be shown that he holds an office from which he earns profit. The quantum of the emoluments that he may be receiving was immaterial. The branch post-master did work under the Government of India and he held an office of profit.

30. Next we come to a case, namely, Panna Lal v. Har Narain, 1964 All LJ 902 also of our High Court but decided by a Single Judge, on which strong reliance has been placed on behalf of respondent No. 1. It was a case of a person who was an officer in the N. C. C. Junior Division. The question was whether it was an office of profit. Rule 35 of the National Cadet Corps Rules, 1948 provided that every officer commissioned in the National Cadet Corps and posted to a unit of the Junior Division shall be entitled 'for period of actual' attendance (the underlining (herein ' ') is mine) at authorised course of instruction in Army schools, and with Army units, including intervening Sundays and holidays to such pay as is specified in Schedule II. It further provided that every officer commissioned in the National Cadet Corps and posted to a unit of the Junior Division shall be entitled to receive at the end of the training year, an honorarium as specified in Schedule II, on condition that he has attended the annual training camp of his unit in such a training year. As to the emoluments provided under Rule 36, it is stated that every officer of the Senior and Junior Division posted or appointed to a unit or part thereof shall be entitled to such allowances as are specified in Schedule II. The learned Judge who decided that case pointed out that from these rules read with Schedule II it appeared that a Junior Division Officer was entitled firstly to pay (ranging between Rs. 130 and Rs. 290 per month) for periods of actual attendance at authorised courses of instruction in Army schools and with Army units, secondly to an honorarium (ranging between Rs. 90 and Rs. 250) at the end of the training year if he has attended the annual training camp in such year and thirdly to an allowance (Rs. 5 per day) for every day of actual attendance at the annual training camp, provided he lives, messes and sleeps in camp. Analysing the nature of these payments it was urged in that case that the payments received by such an officer are not by way of remuneration or profit but are mere allowances granted to him in order to compensate him to cover his expenses while he is attending the Army courses or the annual training camp. The fact that these payments are conditional on attendance at the courses or the camp shows that they are not on a par with an ordinary salary and cannot be treated as plain remuneration for services rendered by the officer. It was urged in the case that he may perform all the duties assigned to him as Cadet Corps Officer and still will not be entitled to draw his honorarium, or daily allowance if he fails to attend the annual training camp and the monthly pay he will get only when he attends Army courses, i. e., for receiving instruction, not for performing duties or rendering services. The learned Judge accepted this contention pointing out that the distinction drawn appeared to be valid and the amounts to which the petitioner in that case was entitled under Rules 35 and 36 could not be equated with remuneration or profit, since they were not paid in return for services rendered. The pay drawn under Rule 35(2) is for receiving instruction and is more analogous to the stipend paid to a scholarship holder than to the salary paid to an employee. The honorarium and allowance drawn under Rules 35(3) and 36(1), which are given for attending training camp, are presumably meant to compensate and cover expenses incurred by the officer in that connection. This case does not define as to what is profit but decides that in the case there was no question of any profit or remuneration as the payment that was made was not made for services rendered

but was made for receiving instruction and for attending training camp, the former being by way of stipend rather than salary and the latter by way of compensation to cover the expenses incurred.

31. We then come to a case of the Calcutta High Court, namely *G. Basu v. San-kari Prasad Ghosal*, (1963) 67 Cal WN 558. It lays down that when the powers of appointment and dismissal are vested in different authorities and the remuneration is paid by another, the office should be deemed to be held under all of them, if a wide connotation and construction be preferable as it should be under Article 102(1)(a) of the Constitution and like provisions.

32. It may here be pointed out that Article 102(i)(a) relates to members of the Central Legislature and is parallel to Article 191(1)(a) and whatever interpretation is put to one is equally applicable to the other. Similarly, the provisions of Section 5-A of the U. P. Panchayat Raj Act also relate to a similar matter, the case of *Cheddu Singh*, AIR 1964 All 179 (Supra) being in connection with the latter.

33. This case of the Calcutta High Court went up to the Supreme Court in *Guru Govind Basu v. Sankari Prasad Ghosal*, AIR 1964 SC 254. The facts, as it appears from the report, are as to whether an auditor appointed under Section 619 of the Indian Companies Act of a Government company by the Central Government on the advice of the Comptroller and Auditor General of India held an office of profit. Under Section 619 the Comptroller and Auditor General, shall have power to direct the manner in which the company's accounts shall be audited by the auditor appointed in pursuance of Sub-section (2) and to give such auditor instruction in regard to any matters relating to the performance of his functions as such, to conduct a supplementary or test audit of the company's accounts by such person or persons as he may authorise in this behalf, and for the purposes of such audit to require information or additional information to be furnished to any person or persons so authorised on such matters, by such person or persons, and in such form, as the Comptroller and Auditor General may, by general or special order direct. The auditor is expected to submit a copy of his audit report to the Comptroller and Auditor General of India who shall have the right to comment upon, or supplement the audit report in such manner as he may think fit. It was pointed out on analysing these provisions that the appointment of an auditor in a Government company rests solely with the Central Government on the advice of the Comptroller and Auditor General of India. The law further provided that an auditor under these provisions may be removed from office before the expiry of his term only by the company in general meeting after obtaining the previous approval of the Central Government in that behalf. It was held that it was clear that the appointment of an auditor in a Government company rests solely with the Central Government and so also his removal from office. The Comptroller and Auditor General of India exercised control over the auditor of a Government company in respect of various matters including the manner in which the Company's accounts shall be audited. The Auditor General has also the right to give such auditor, instructions in regard to any matter relating to the performance of his functions as such. The Auditor General may conduct a supplementary or test audit of the company's accounts by such person or persons as he may authorise in this behalf. In other words, the Comptroller and Auditor General of India exercises full control over the auditors of a Government company. The case was distinguished from that of *Abdul Shakur*, AIR 1958 SC 52 (Supra) by pointing out that the appellant in that case was the manager of a school run by a committee of management formed under the provisions of the Durgah Khwaja Saheb Act, 1955. He was appointed by the administrator of the Durgah and was paid Rs. 100 per month. It was pointed out that in that case appointment of the appellant was not made by the Government nor was he liable to be dismissed by the Government, The appointment was made by the administrator of a committee and he was liable to be dismissed by the same body and though the Committee of the Durgah Endowment was to be appointed by the Government of India, it was a body corporate with perpetual succession acting within the four corners of the Act. Merely because the Committee or the members of the Committee were removable by the Government of India or the Committee could make bye-laws prescribing the duties and powers of its employees could not convert the servants of the Committee into holders of office of profit under the Government of India. The appellant in that case was neither appointed by the Government of India nor was removable by the Government of India nor was he paid out of the revenues of India. The decision that

ultimately emerged in that case has been correctly summarised in the head note as follows :--

'For holding an office of profit under the Government, one need not be in the service of Government and there need be no relationship of master and servant between them. The Constitution itself makes a distinction between the holder of an office of profit under the Government and the holder of a post or service under the Government. The Constitution has also made a distinction between the holder of an office of profit under the Government and the holder of an office of profit under a local or other authority subject to the control of Government. The decisive test for determining whether a person holds any office of profit under the Government is the test of appointment. It is not correct to say that the several factors which enter into the determination of this question -- the appointing authority, the authority vested with power to terminate the appointment, the authority which determines the remuneration, the source from which the remuneration is paid, and the authority vested with power to control the manner in which the duties of the office are discharged and to give direction in that behalf -- must all co-exist and each must show subordination to Government and that if one of the elements is absent, the test of a person holding an office under the Government, Central or State, is not satisfied. The circumstance that the source from which the remuneration is paid is not from public revenue is a neutral factor -- not decisive of the question. Whether stress will be laid on one factor or the other will depend on the facts of each case. However, where the several elements, the power to appoint, the power to dismiss, the power to control and give directions as to the manner in which the duties of the office are to be performed, and the power to determine the question of remuneration are all present in a given case, then it must be held that the officer in question holds the office under the authority so empowered.'

34. In this state of authority we have to see as to who is the appointing authority of respondent No. 1 as Adjutant. We have also to see as to who is the authority who can terminate the appointment. We , have further to see whether it is that authority which determines the remuneration. We have also to look to the source from which the remuneration is paid, and also the authority vested with the power to control the manner in which the duties of the office are discharged and to give directions in that behalf.

35. It has already been described in detail how the appointment of an Adjutant is made, who make the appointment and who is in charge of discipline. We also know that the source from which the remuneration is paid is the public revenue and the authority who has power to control the manner in which all the duties are discharged is either the Government or an officer under the Government. Obviously, therefore, respondent No. 1 holds an office under the Government of the State of Uttar Pradesh. The question is whether it is an office of profit. The determining factor in such a case is as to whether he earned any profit or remuneration from the Government revenue. The quantum of remuneration is immaterial. Respondent No. 1 used to get an allowance of Rs. 50 per mensem for purposes of his duties. Can it be said to be a consolidated fee for the out-of-pocket expenses that he had to incur, as contemplated in Ravanna Subanna's case, AIR 1954 SC 653 (Supra) or is it by way of stipend paid to a scholarship holder or honorarium or allowance for attending training camp as contemplated in Panna Lal's case, 1964 All LJ 902 (supra)?

36. The learned counsel for respondent No. 1 strongly relied on the two cases, just referred to, to support his contention that the remuneration of Rs. 50 per mensem was only an honorarium, to meet his out-of-pocket expenses and at the most was no better than a stipend paid to a scholarship holder. According to him, it was not a salary or remuneration as contemplated under the word 'profit' used in the phrase 'office of profit'. We will see that the Government used the term remuneration in the shape of an honorarium in their earliest letter dated the 28th of February, 1963 (Exhibit A-4), but later on they reverted to the phrase 'Instructor's allowance' and that is how the payment has been described in the various letters thereafter. The Government, however, again clarified the matter in their letter dated March 9, 1964 (Exhibit A-8) where they again say that the payment of this amount may be treated as an honorarium. It is how the Government regard the payment that used to be made to respondent No. 1 as an Adjutant. It is the nature, of the payment or what has sometimes been described as the 'pith and substance' that is to be looked into. A rose will smell as sweet, call it by whatever name. So it is not the name that is given by the Government to a certain payment. It is the

nature of the payment that will determine as to whether the payment can be said to be a remuneration for the post. The payment is a periodical payment made from month to month. It is not made specifically for a certain period when the Adjutant attends to the parades. It is not also a payment which is made to him only during the course of his training. The payment, therefore, is neither a stipend nor an allowance by way of meeting out-of-pocket expenses. It is a consolidated sum paid every month. It is not stated that this payment is made for attending the parades only. The payment is attached to the office. The payment, no doubt, is a small amount, but that is not the question. It is a remuneration paid for the services. The services may have been offered at personal sacrifice in the national cause, but that did not take out the remuneration paid for the services from the category of its being 'profit' which the office of an Adjutant brought to respondent No. 1. The three tests laid down in the case of Dr. Deorao Laxman Anande, AIR 1958 Bom 314 (supra) as to what authority has the power to make the appointment to the office, what authority can take disciplinary action and remove or dismiss the holder of the office and by whom and from what source is his remuneration paid are satisfied in this case. The authority in every case is the Government itself. I have, therefore, no hesitation in holding that at the relevant time respondent No. 1 held an office of profit under the Government of Uttar Pradesh.

37. The Constitution, however, gives power to the State Legislature to provide by law that a certain office shall, even though it may be an office of profit, not disqualify its holder. In this connection attention has been drawn to two statutes of the Legislature of the State of Uttar Pradesh and it is urged that even if respondent No. 1 be held as holding an office of profit at the relevant time, he should not be held to be disqualified in view of the exemption provided under those statutes.

38. The two statutes are Act XIX of 1951 and Act XIII of [1952](#).

39. Under Section 3 of the former statutes an honorary officer for the purpose of any special duty shall not be disqualified and shall be deemed never to have been disqualified for being a member of the State Legislature constituted under Article 332 of the [Constitution of India](#), provided that the holder of the office has been in receipt merely of compensatory allowance in accordance with any general or special order applicable thereto.

40. In order to come under this provision of law, three things are requisite. The officer must be an honorary officer, he must be an officer appointed for the purpose of a special duty and thirdly he must have been in receipt merely of compensatory allowance in accordance with any general or special order applicable thereto.

41. There is no doubt that respondent No. 1 was an officer. He is not an honorary officer. The word 'honorary' in accordance with the meaning of that word in Shorter Oxford English Dictionary means 'giving services without emolument.' As I have already held, the office of the Adjutant in the Home Guards is not honorary. It is not an office held for the purpose of special duty also.

42. The learned counsel pointed out that because the nature of the duty of Home Guards is special, the duties having already been described above, it is a case of a special duty. The Home Guards are auxiliary to the police and they are required to render assistance to the community in emergency, but generally they are to help in maintaining internal security. It cannot be said to be a special duty. If the word, 'special' is used in such a wide meaning, then a Judge who performs judicial duty will be held to hold a special duty. Medical officers to the Government would also be holding special duties and so will the other officers of the Government, for the duties of each class are of a special type. A special duty in the context connotes a particular type of duty which is allotted to an officer. A person is appointed on special duty by Government when special type of work is to be done for the Government not on a permanent basis but as a result of some special circumstance. For instance, the Government may appoint an officer to examine into the text books prescribed for various examinations and a person so appointed will be an officer on special duty. His office will be terminated as soon as his work will finish. A person may be appointed to revise the manuals of any department. Such an officer also will be an officer on special duty. But the type of work which respondent No. 1 was expected to do as an Adjutant was not of a temporary nature or of a special nature arising out of some special requirement

of the Government which requirement was not to last long. Respondent No. 1, therefore, could not have been said to have been holding the office of the Adjutant in the Home Guards by way of special duty.

43. Lastly, his is not a case in which he was merely paid compensatory allowance. His is a case in which he was paid a salary. He would not, therefore, be exempted under the provision of Act XIX of 1951.

44. Now let us look to the provisions of Act XIII of [1952](#). At the outset it may be pointed out that Section 2 of this Act defines the term 'Compensatory allowance', but strange though it may appear this term has nowhere been used in the provisions of the statute apart from the definition itself. In any case, it is clear that respondent No. 1 was not exempt from being disqualified from being chosen as or for being a member of the Uttar Pradesh State Legislature, for though he was holding an office which was not a whole time office, it was remunerated by salary if not by fees. In order to come under Section 3(2) of the Act for purposes of exemption, it should not only be an office which is not a whole-time one but also an office which is not remunerated by salary. The meaning of the word 'salary' to be found in the Webster's New International Dictionary is 'the recompense or consideration paid, or stipulated to be paid, to a person at regular intervals for services especially to holders of official, executive, or clerical positions; fixed compensation regularly paid, as by the year, quarter, month, or week.' Thus the periodical payment that was made to respondent No. 1 was salary. Respondent No. 1, therefore, is not exempt even under this statute.

45. My finding on issue No. 1, therefore, is that respondent No. 1 is not an Adjutant under the U. P. Home Guards Adhiniyam. The question whether he holds an office of profit in that connection does not arise. He is, however an Adjutant under the Government Scheme promulgated prior to the coming into force of the Adhiniyam and does hold an office of profit. He is not exempt under U. P. Act XIX of 1951 and U. P. Act XIII of [1952](#) from the disqualification attached to the office under Article 191 of the Constitution.

46. Issue No. 2 -- A copy of the order of appointment of respondent No. 1 (Exhibit 1) shows that he was selected and appointed as a Gaon Samaj Panel Lawyer for a period of three years under Sub-rule (1)(c) of Rule 114 of the U. P. Zamindari Abolition and Land Reforms Rules, [1952](#), as from the 14th of September, 1965, which order was communicated to him under the signature of the Additional District Magistrate, Lucknow. The question is whether his being appointed to the post of a panel lawyer under the Government of Uttar Pradesh amounts to his holding an office of profit within the meaning of that term under Article 191 of the Constitution.

47. The appointment of such a lawyer is contemplated under Section 127-B of the Abolition Act which provides :--

'Section 127-B(1). The State Government may, on such terms and conditions and in such manner as may be prescribed, appoint in each district a panel of lawyers to conduct suits and other proceedings by or against the Gaon Sabhas in respect of their functions under this Act.

(2) A panel lawyer shall with respect to such Gaon Sabhas in the district, as may be prescribed, be their agent for the purpose of receiving processes issued by any court or any authority against them in respect of their functions under this Act and shall be deemed to be the recognised agent by whom appearances, acts and applications under this Act, or the United Provinces Land Revenue Act 1901 or any other law relating to land tenure may be made or done on behalf of such Gaon Sabhas.'

48. Rule 114 of the U. P. Zamindari Abolition and Land Reforms Rules, [1952](#) (hereinafter referred to as the Rules) in so far as it is relevant provides as follows :--

'114(1) For the conduct of suits, applications and other proceedings by or against the Gaon Sabha, the following shall be appointed to the panel of lawyers in each district for the Courts specified against each.

(a) .....

(b) .....

(c) A Mukhtar, a revenue agent or a lawyer to be selected for appointment by the Collector who is hereby empowered to make the appointment on behalf of the State Government -- for Revenue Courts at Tahsil headquarters. He shall be the recognised agent of the Gaon Sabhas only for cases in Revenue Courts at Tahsil headquarters.

(d) .....

(2) The term of the tahsil panel lawyers shall not exceed three years but the appointing authority may remove any such lawyer before the expiry of his term.

(3) The District Officer shall maintain a confidential personal file of every panel lawyer and shall annually enter therein remarks on the lawyer's capacity, efficiency and integrity.

(4) The terms and duties of the panel lawyers and control of the Collector over them shall be governed by the instructions for the conduct of Gaon Sabha litigation issued in G. O. No. 2240-AZ/I-A-1165-1964, dated August 20, 1958, or such instructions as may be issued by the State Government from time to time.'

49. A copy of the G. O. in question has been filed on the record as Exhibit 3. Paragraph 4 of the Instructions in that G. O. contemplates the appointment of a Mukhtar or revenue agent or vakil or pleader at each tahsil headquarters to represent the Gaon Samajas (now Gaon Sabhas) and do pairvi for them in tahsil and district courts. Paragraph 5 provides that the panel lawyers shall always be available to give free legal opinion and advice to the Land Management Committee, whose Chairman can directly consult them on points of law, particularly in all cases where Gaon Samajas (Gaon Sabhas) have been impleaded as defendants or where they propose to file a suit or an application under the Zamindari Abolition and Land Reforms Act or the Land Revenue Act. Under paragraph 7 of the Instructions panel lawyers cannot be engaged in criminal case or cases under the Panchayat Raj Act. They can appear only in those cases in which their engagement is approved by the Collector or the Sub-Divisional Officer. They would also defend the interest of the State in all cases in which the State is a party unless the Collector directs otherwise. They are under a disability to appear in any case against the Gaon Samaj (Gaon Sabha) barring exceptional cases in which they may be allowed to do so by the Collector. The Collector shall give such permission only when there is no conflict between the Gaon Samaj (Gaon Sabha) and the other party. Under paragraph 32 of the Instructions the Tahsil panel lawyers will submit to the Collector through the Sub-Divisional Officer, a bimonthly progress report in respect of the litigation work done by each of them in a certain pro forma prescribed under that instruction. This report is to be accompanied by a descriptive report which would show the nature of cases instituted or contested under each provision of law and the results generally obtained along with the comments of the lawyers concerned for generally improv-ing the manner and method of conducting Gaon Samaj (Gaon Sabha) litigation. Paragraph 24 of the Instructions provides as to the presentation of the bills to the Collector by the penal Lawyers. Paragraph 25 provides that the Gaon Samaj Panel Lawyers are not required to file certificate of fee for getting their fee taxed and included in decrees and orders. Paragraph 26 provides for the fees payable to panel lawyers, mukhtars and revenue agents which will be in accordance with the valuation in Civil cases and in accordance with the rules laid down in Chaper VIII of the Revenue Court Manual in revenue cases subject to the condition that the minimum fee payable in any case shall not be less than Rs. 5. Paragraph 27 of the Instructions provides for the clerks of panel lawyers also being paid fee of rupee one per case or suit. Paragraph 28 provides for the supply of plain paper and other necessary stationery to the Panel Lawyers. Paragraph 31 provides for panel Lawyers to file vakalatnamas or power of attorney on behalf of the Gaon Samaj in each case. Such vakalatnamas shall be signed by the Chairman or the person authorised. Paragraph 12 provides that if a suit or a proceeding on behalf of the Land Management Committee is to be instituted in a Court at the district headquarters, the Sub-Divisional Officer shall submit all the papers for the orders of the Collector. The Collector shall then decide whether a suit or proceeding is to be instituted or not. He may in this connection consult the headquarters panel lawyer or the District Government Counsel, if he considers

necessary. Under paragraph 13 if the suit or proceeding had been instituted in a court at the tali-sil headquarters and the Government is not a party, the Sub-Divisional Officer shall take a decision as to whether the case is to be contested or not.

50. As to the source of remuneration, it is provided under Section 125-A of the Abolition Act that there shall be constituted for each district a Consolidated Gaon Fund to which shall be credited all contributions payable under Sub-section (2) of that section. Sub-section (2) provides that every Gaon Panchayat in the district shall pay to the Collector annually such contribution not exceeding fifteen per cent of the total amount credited to the Gaon Fund, as may be fixed by the Collector in the manner prescribed. This consolidated fund shall be applied, among other things, to the payment of fees and allowances of the panel lawyers appointed under Section 127-B. The source of payment, therefore, is the Consolidation Gaon Fund.

51. The question to be decided is as to whether in view of the above rules respondent no. 1 can be said to be holding an office of profit under the Government of Uttar Pradesh. by virtue of his being a panel lawyer of the Gaon Sabhas (formerly Gaon Samajas) at the Tahsil Headquarters.

52. The contention on behalf of respondent No. 1 is that, in the first place, Respondent No. 1 does not hold an office at all. Apart from it, he does not hold an office of profit. In that connection his argument is that he is only one of the panel lawyers which means one of a list of lawyers and it is at the sweet will of the Collector whether he will be engaged in a case or not. He will only be available for professional engagement and as such he may in the end earn any remuneration or he may not earn any remuneration. In the circumstances, he cannot, according to the argument, be considered to be holding an office. The fees that he gets, he gets in a particular case in which he is employed. His, therefore, is only a professional engagement like the professional engagement of any lawyer for a client. He cannot in the circumstances be said to be the holder of any office much less an office of profit. Apart from it, it is also urged that even if he is held to be holding an office of profit, he is exempted from the disqualification in view of the provisions of Act XIX of 1951 and Act XIII of [1952](#), referred to in connection with issue No. 1.

53. It is very difficult to define the term 'office' with any exactitude. The Chief Election Commissioner, In the matter of Vindhya Pradesh Legislative Assembly Members, (1953) 4 Ele LR 422 tried to define the term 'office', but though he started with the dictionary meaning of that term and the definitions contained in Burrow's Words and Phrases, Tomlin's Law Dictionary, Luce's Legislative Assemblies, he could not arrive at any definition.

54. We would get an idea as to what is an office from the observations made in the Supreme Court case, namely, Fadam Sen v. State of Uttar Pradesh, AIR 1961 SC 218 at p. 220 where in paragraph (15) the following observations have been made :

'The word 'situation' according to Webster's New International Dictionary of the English Language, means : position or place of employment, place, office; as a situation in a store. The apposite meaning for the purposes of this Explanation would be 'office'. 'Office' again, according to the same Dictionary, means a special duty, trust, charge or position, conferred by an exercise of governmental authority and for a public purpose; a position of trust or authority conferred by an act of governmental power; a right to exercise a public function or employment and receive the emoluments (if any) thereto belonging; as, an executive or judicial office .... In a wider sense, any position or place in the employment of the Government, especially one of trust or authority. The Dictionary further notes the differences in the connotations of the various words office, post, appointment, situation and place and says : Office commonly suggests a position of (especially public) trust or authority; and situation emphasizes the idea of employment, especially in subordinate position; as, to seek a situation as governess, as private secretary.'

55. The Rajasthan High Court tried to lay down certain criteria in AIR 1959 Raj 227 (supra) as to what the term 'office' means. The criteria that they laid down were :

'(1) That the office should be independent of the person holding it, meaning thereby that the office must exist even if the person is not there.

(2) The office cannot be assignable or heritable.

(3) That there should be a relation of master and servant between the Government on the one hand and the person holding the office on the other, and

(4) that it must be for a specified period.'

But these criteria have not been found to be satisfactory.

56. The Bombay High Court in AIR 1958 Bom 314 (supra) describes the negative aspect of the case that the word 'office' does not necessarily imply that it must have an existence apart from the person who may hold it. Cases are known, in which, in order to make use of the special knowledge, talent, skill or experience of certain persons, posts are created which exist only so long as they hold them. It will be difficult to hold that such persons are not holders of offices. The first criterion, therefore, in Hoti Lal's case, AIR 1959 Raj 227 (supra) is not an essential criterion.

57. In the case of Ramappa v. Sang-appa, AIR 1958 SC 937 the theory that the office cannot be assignable or heritable also has been exploded. That was a case of Patels and Shanbhogs who are appointed to their offices by the Government though the Government has no option in certain cases but to appoint an heir of the last holder; they hold their office by reason of such appointment only; they work under the control and supervision of the Government, their remuneration is paid by the Government out of Government funds and assets; they are removable by the Government, and there is no one else under whom their offices could be held. They were all held as holding offices of profit under the Government.

58. The theory of master and servant also receives a shock from the Supreme Court case of Guru Govind Basu, AIR 1964 SC 254 (supra). It would thus appear that the criteria in Hoti Lal's case, AIR 1959 Raj 227 (supra) are not essential criteria for determining whether a person holds an office or not. It is, therefore, difficult to define the term 'office', though the meaning of the word is well understood.

59. One of the grounds on which it is urged that the respondent No. 1 does not hold an office is that he is only a counsel appearing on behalf of Gaon Sabhas in the Tahsil concerned and that his is but a professional engagement like any other engagement by a client. The Lawyer does not hold an office for his client, though he performs a duty for him. This contention, though attractive, is without substance when we look into the details of the appointment. The rules do not provide, as the learned counsel would have me hold, that there are a number of lawyers for the Gaon Sabhas in the Tahsil Mohanlalganj, amongst whom he is one and if the Collector takes it into his head or it so occurs that no Gaon Sabha in the Tahsil is advised to fight any litigation that it may like to institute or it may like to defend, by the revenue authorities, i. e., the Sub-Divisional Officer or the Collector, he may not get any case at all during the year. The rules do not contemplate that there will be several panel lawyers in the same Tahsil. Under Rule 114 of the Zamindari Abolition Rules the word 'panel' is used for the whole list of lawyers that are appointed in the courts of various grades in the district. There is the District Government Counsel (Civil) for Civil Courts in the District headquarters. There is the District Government Counsel (Revenue) for Revenue Courts at the District headquarters and there is a mukhtar or a revenue agent or lawyer for courts at the tahsil headquarters. Thus so far as Tahsil headquarters are concerned, there is only one lawyer. Three sets of lawyers, namely, the District Government Counsel (Civil), the District Government Counsel (Revenue) and the lawyers at the Tahsil headquarters are known to constitute a panel. It is not that several lawyers are appointed at Tahsil headquarters and it is from out of those lawyers that the revenue authorities select one or the other to conduct the cases on behalf of Gaon Sabhas at the Tahsil headquarters. There is only one panel lawyer for each Tahsil headquarters. This is precisely what the appointment order (Exhibit 1) shows. Three lawyers have been appointed under that order, but they have been appointed for three different Tahsils and respondent No. 1 has been appointed for the

Tahsil of Mohanlalganj. So it is not a case of an approved list of lawyers out of whom one or the other may be appointed to conduct the litigations of the Gaon Sabhas at the Tahsil headquarters. This case is different from the case of a railway counsel who is one out of a panel of lawyers appointed to conduct the cases on behalf of the railway like the one contemplated in the case decided by the Election Tribunal at Allahabad in Govind Malaviya v. Murli Manohar, (1953) 8 Ele LR 84. In that case Murli Manohar, the returned candidate, who was a railway counsel, was described by the Assistant Traffic Superintendent as a retained railway counsel. He was just a pleader like any other pleader. In that case whenever the railway engaged him he was engaged through a separate vaka-latnama. He was at liberty to appear against the railway in cases in which he was not engaged by the railway. The Law Inspector stated in that case that Sri Murli Manohar was engaged only in difficult cases or cases of high valuation. He was not engaged in other cases. In the instant case respondent No. 1 is the only lawyer in the Tahsil of Mohan-lalganj who conducts the cases on behalf of the Gaon Sabhas. It is not a case where it is the choice of the revenue authorities to engage him or not. It may be that the authorities may decide that they would not contest a case and so he would not be engaged. Under the rules, as already pointed out above, he is to be available for consultation in all cases. He is under the control of the district authorities inasmuch as he has to submit bimonthly progress report in respect of the litigation work (done) by him. He cannot appear against the Gaon Sabhas barring exceptional circumstances in which he may be allowed to do so by the Collector. Under Section 127-B(2) of the Abolition Act he shall be the agent for the Gaon Sabhas for the purposes of receiving processes issued by any court or authority against them and shall be deemed to be their recognised agent by whom appearances, acts and applications may be made or done on behalf of the Gaon Sabhas. It cannot, therefore, be said that he does not hold an 'office.' He holds an office under the State Government being under the control of the State Government or its officers. The office is an office of profit as it brings him remuneration in cases in which he is engaged. The source of payment, no doubt, is the Gaon Sabha Fund, but as has already been pointed out in connection with the discussion of issue No. 1, that is not the determining criterion. The appointing authority, as shown in the order of appointment is an officer of the State Government. The authority is vested with the power to terminate his appointment. The authority determines his remuneration as prescribed under the rules. The source, no doubt, is the Gaon Sabha Fund, but the payment is controlled by the Collector. The Government determines the manner in which the duties of the office are discharged and also gives directions in that behalf. The office cannot but be an office of profit under the Government of Uttar Pradesh.

60. The question now arises as to whether in this case also respondent No. 1 is exempted from his disqualification under the two statutes, namely, Act XIX of 1951 and Act XIII of [1952](#). I need not enter into a detailed discussion as to what is an office of special duty. Obviously, this is not an office for the performance of any special duty, for this is a work which can be done by any other qualified lawyer provided he is appointed to the post. It is not a case where the office is honorary or only compensatory allowance is payable within the definition of that term under Section 2 of Act XIX of 1951. It is, no doubt, not a whole time office, but it is remunerated by fees though not by salary. The provisions of Act XIII of [1952](#) also are thus not helpful, to the respondent No. 1.

61. My finding on issue No. 2, therefore, is that respondent No. 1 does hold an office of profit within the meaning of that term under Article 191 of the Constitution on account of his being a panel lawyer of the Gaon Sabhas in the Tahsil of Mohanlalganj and he is not exempted under U. P. Act XIX of 1951 and U. P. Act XIII of [1952](#).

62. Third part of issue No. 5 :- We now come to the third part of issue No. 5. For purposes of deciding that issue we shall presume that respondent No. 1 has failed to show the expenses incurred by him on the polling day in the return of expenses and also the expenses of a sum of Rs. 50 advanced by him to one Chamman. The question is whether this amounts to a corrupt practice under Section 123(6) of the Representation Act. This corrupt practice is described as follows :

'123(6). The incurring or authorising of expenditure in contravention of Section 77.'

There is thus prohibition against incurring or authorising such expenditure as is prohibited under Section 77. Section 77, on the other hand, provides :

'77(1) Every candidate at an election shall, either by himself or by his election agent, keep a separate and correct account of all expenditure in connection with the election incurred or authorised by him or by his election agent between the date of publication of the notification calling the election and the date of declaration of the result thereof, both dates inclusive.

(2) The account shall contain such particulars, as may be prescribed.

(3) The total of the said expenditure shall not exceed such amount as may be prescribed.'

63. We will see that Section 77(1) requires every candidate at an election to keep a separate and correct account of expenditure in connection with the election incurred or authorised by him or by his election agent between certain dates. This is to be kept either by himself or by his election agent. This provision does not provide as to what expenses shall be incurred or authorised by a candidate or his election agent. Subsection (2) provides that the account shall contain such particulars, as may be prescribed, namely, prescribed by the rules. Sub-section (3) provides that the expenditure shall not exceed such amount as may be prescribed under the rules. Sub-section (3), therefore, is the only provision which issues a mandate against a candidate or his election agent against incurring or authorising expenditure beyond a certain limit. It is the breach of this mandate which amounts to corrupt practice under Sub-section (6) of Section 123 of the Representation Act. The fact that the candidate or his election agent entered certain items of expenditure in his statement of return of expenses does not mean that he has incurred any expenditure against the mandate under Sub-section (3) of Section 77 or that any such expenditure was authorised. It is, therefore, not a case of the corrupt practice covered by Sub-section (6) of Section 123.

64. It at the most amounts to the non-compliance with the provisions of the Representation Act, as contained in Sub-sections (1) and (2) of Section 77 and this non-compliance will be of no avail to the petitioner unless he shows that this non-compliance has materially affected the result of the election (vide Section 100(1)(a)(ii) of the Representation Act). There is no allegation in the case at all that the non-compliance of this provision of Section 77 of the Representation Act has materially affected the result of the election.

65. This view is supported by a number of authorities also of which only two of our High Court need be mentioned, namely, *Chavar Ali Khan v. Keshav Gupta*, AIR 1959 All 264 and *Karan Singh v. Jamuna Singh*, AIR 1959 All 427.

66. It is laid down in *Chayar Ali's case*, AIR 1959 All 264 that the corrupt practice mentioned in Section 123(6) does not cover a case where the accounts under Section 77(1) have not been daily and regularly kept by the candidate or his election agent. That sub-section defines corrupt practice as 'the incurring or authorising an expenditure in contravention of Section 77.' The corrupt practice thus does not consist in not maintaining the account as required by Sub-section (1) of Section 77, but it consists of incurring or authorising an expenditure in contravention of Section 77, which would, be a case where the total of the expenditure exceeds the amount prescribed under the rules, as mentioned in Sub-section (3) of Section 77. It is the incurring or authorising an expenditure in contravention of Section 77 which has been made a corrupt practice and not an irregular maintenance of accounts. It would thus appear that the only contravention of Section 77 which falls under Section 123(6) is the contravention of Sub-section (3) of Section 77. The irregularity in maintaining accounts does not fall under Section 123(6) of the Act at all.

67. Similarly, in *Karan Singh's case*, AIR 1959 All 427 (supra) it is laid down that under Section 123(6) of the Act, a corrupt practice consists in incurring or authorising of expenditure in contravention of Section 77 of the Act. Sub-sections (1) and (2) of Section 77 merely require that correct and separate accounts be kept and give the contents of those accounts. They do not prescribe any limitation on the incurring or authorising of expenditure. All that is laid down by Sub-section (1) is that expenses which have been incurred or have been

authorised are to be included in the accounts. Inclusion in the accounts is not a condition of incurring or authorising of an expenditure. The incurring or authorising of an expenditure is only limited by the provisions of Sub-section (3) of Section 77 which lay down that the said expenditure shall not exceed such amount as may be prescribed.

68. It is further pointed out therein that where the issue as framed only relates to omission of certain items from account and there is no allegation that the expenditure incurred or authorised by the respondent was in excess of the prescribed limitation, the issue does not really deal with the question of commission of corrupt practice covered by Section 123(6) of the Act, but really amounts to raising questions about the non-compliance with the provisions of the Act and the Rules framed thereunder which could be a ground for setting aside an election under Section 100(1)(d)(iv) of the Act, provided there was allegation and proof that the result of the election has been materially affected by that non-compliance.

69. This issue is accordingly decided in the negative.

**SooperKanoon - India's Premier Online Legal Search - [sooperkanoon.com](http://sooperkanoon.com)**